UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES EASON,)
)
Petitioner-Appellant,)
)
v.) No. 20303
)
FRED R. DICKSON, Chairman,)
Adult Authority of the State)
of California,)
)
RICHARD A. McGEE, Administrator,)
Youth and Adult Corrections Agency)
of the State of California,)
)
Respondent-Appellee.)

BRIEF OF APPELLEE

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JURISDICTION

The jurisdiction of this Court is conferred by Title 28, United States Code section 2281 and Rule 73a of the Federal Rules of Civil Procedure which make a final order of the District Court reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal by a state prisoner from an order of the United States District Court for the

Northern District of California, Southern Division denying appellant's petition for the convening of a three-judge court to hear a civil action brought under the provisions of the Federal Civil Rights Act (Title 28 U.S.C. section 1343, and Title 42 U.S.C. sections 1981 and 1983). He seeks a permanent injunction against the Adult Authority, the Department of Corrections, and the Warden of the California State Prison at San Quentin, California, restraining said officials from proceeding to conduct parole violation hearings without affording the prisoner the right to counsel or the right to present witnesses. He also seeks compensation in the amount of $50,000 general damages, and $1 Million punitive damages for alleged illegal detention by the defendants.

A. The Complaint.

The principal allegation of the complaint is that the Adult Authority conducted appellant's parole violation hearing so as to deny appellant a fair hearing, in violation of section 2924 of the California Penal Code. Specifically, appellant contends that the Adult Authority deprived him of his right to present evidence, to present witnesses, and to be represented by counsel at his parole violation hearing.

B. The Adult Authority Records.

Appellant was received at the California State

Prison at San Quentin on January 13, 1947, under commitment from the Superior Court of Kern County for the offense of two counts of robbery in the first degree, in violation of section 211 of the California Penal Code. He was paroled on January 13, 1954. On December 6, 1956, his parole was suspended and his term refixed at the maximum.

On May 21, 1957, appellant was returned to the custody of the Department of Corrections as a parole violator. On September 18, 1957, at a hearing before the Adult Authority on the charge of parole violation, the appellant pled guilty to the parole violation charge and his parole was revoked.

SUMMARY OF APPELLEE'S ARGUMENT

I. Appellant has failed to attack the constitutionality of a state statute.

II. The appellant has failed to present a substantial federal question.

ARGUMENT

I

APPELLANT HAS FAILED TO ATTACK THE CONSTITUTIONALITY OF A STATE STATUTE

Title 28, section 2281 of the United States Code lays down as one of the requirements for a three-judge court that the injunction against the officer of the state must be sought "upon the ground of the unconstitutionality

of such statute." An examination of appellant's brief reveals that appellant has not attacked the constitutionality of section 2924 of the California Penal Code. Section 2924 of the California Penal Code provides:

> "Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and an adjudication by the Adult Authority that such prisoner was guilty thereof, which adjudication shall be final. The Adult Authority may hold the hearing itself or authorize a committee of officials of the prison, including the warden, to hold the hearing and make its recommendations to the authority. At any hearing such prisoner, unless outside the walls of the prison as an escapee and a fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf."

However, appellant contends:

> "The statutory requirements [of section 2924] were not complied with, so any act of the appellees revoking appellant's parole and refixing his term of imprisonment at its maximum . . . was illegal as depriving him of due process of law and of the equal protection of the law as promulgated by the California legislature with its enactment of

> Section 2924, Penal Code." (AOB 6:6 - 7:2).

Appellant concludes:

> "Under these rules of law, Section 2924 of the California Penal Code becomes unconstitutional in its application to appellant because in revoking appellant's parole and considering his cause for forfeiture of credits, the appellees have not complied with said statute." (AOB 8:1-6).

In regard to the necessity of a three-judge court, the United States Supreme Court in Ex parte Bransford, 310 U.S. 354, 361 (1940), has said:

> "It is necessary to distinguish between a petition for injunction on the ground of the unconstitutionality of a statute as applied, which requires a three-judge court, and a petition which seeks an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute which is not attacked as unconstitutional. The latter petition does not require a three-judge court. In such a case the attack is aimed at an allegedly erroneous administrative action. Until the complainant in the district court attacks the constitutionality of the statute, the case does not require the convening of a three-judge court, any more than if the complaint did not seek an interlocutory injunction."

Since appellant is in fact attacking the Adult Authority's failure to comply with the mandate of section 2924 of the California Penal Code, the injunction sought is obviously not upon the ground of the unconstitutionality of the state statute as tested by the United States Constitution. Insofar as appellant claims that he is being discriminated against because other prisoners have received all the benefits of section 2924 of the California Penal Code it is clear that such action, if improper, is so because of a wrong done by the members of the Adult Authority under the statute rather than because of the requirement of the statute itself. Where the issue is one of actual discrimination rather than the constitutionality of a state law the issue is factual and may not properly be addressed to a three-judge court. Ex parte Bransford, supra; Andrew G. Nelson, Inc. v. Jessup, 134 F.Supp. 218 (S.D. Ind. 1955); Nichols v. McGee, 169 F.Supp. 721 (N.D. Cal. ND. 1959). Since the allegedly improper action of the Adult Authority is not directly attributable to the state statute under attack, appellant's petition for the convening of a three-judge court was properly denied by the trial judge.

II

THE APPELLANT HAS FAILED TO PRESENT A SUBSTANTIAL FEDERAL QUESTION

A Federal district judge has authority, without convening a three-judge court, to dismiss for want of jurisdiction an action to enjoin the enforcement of a state statute when the cause of action does not present a substantial federal question. Ex parte Poresky, 290 U.S. 30 (1933); Water Service Company v. Redding, 304 U.S. 252 (1938).

Appellant contends that his hearing on parole violation charges was conducted under color of state law in violation of California Penal Code section 2924.

It is only the deprivation of rights derived under the federal constitution and laws which give rights to an action under sections 1981 and 1983 of Title 42, United States Code. The fact that defendants, while acting under color of other law, may have violated a state law or the state constitution, is not a basis for an action under the Federal Civil Rights Act, unless the violation results in a deprivation of some right which the appellant has under the federal constitution and laws.

> "Violation of local law does not necessarily mean that federal rights have been invaded. The fact that a prisoner is assaulted, injured, or

> even murdered by state officials does not necessarily mean that he is deprived of any right protected or secured by the Constitution or laws of the United States." Screws v. United States, 325 U.S. 91, 108 (1944).

Appellant contends in his complaint that the defendants' violation of the above mentioned statute, by conducting the hearing without allowing appellant to present witnesses and being represented by counsel, was a denial of equal protection of the laws. In Snowden v. Hughes, 321 U.S. 1 (1943), the Court, in affirming the dismissal of a complaint based on the civil rights statute, pointed out that the denial of equal protection of the laws involves more than discrimination or unequal treatment. The Court said:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.
>
> * * *
>
> "But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 U.S. 519, 520, 47 L.Ed.

> 472, 573, 23 S.Ct. 402, there must be a showing of 'clear and intentional discrimination,'
>
> * * *
>
> "A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored." Snowden v. Hughes, supra at 8 and 11.

The complaint here alleges no facts which, if proved, would show a purposeful discrimination, and therefore fails to state a claim of denial of the equal protection of the laws upon which relief can be granted.

It is not alleged in the complaint to what respect the acts complained of resulted in a denial of due process of law. As previously pointed out, Screws v. United States, supra, held that the violation of local law by state officers does not necessarily mean that federal rights have been invaded, and the fact that a prisoner may be injured by state officials does not necessarily mean that the prisoner is thereby deprived of any right protected or secured by the Constitution or laws of the United States.

Therefore, even assuming the validity of appellant's allegations as set forth in the complaint, such allegations do not institute a denial of equal

protection of the laws or due process or the deprivation of any other rights of the plaintiff under the federal constitution and laws.

Furthermore, section 2924 by its very wording is applicable only to a hearing upon the forfeiture of time credits and has no application to a hearing on parole violation charges. The governing section on parole violation charges is section 3060 of the California Penal Code which provides:

> "The Adult Authority shall have full power to suspend, cancel or revoke any parole without notice, and to order returned to prison any prisoner upon parole. The written order of any member of the Adult Authority shall be a sufficient warrant for any peace or prison officer to return to actual custody any conditionally released or paroled prisoner."

In construing this section, the Supreme Court of California has said:

> "There is no statutory requirement that the parolee have notice or a hearing before his parole may be suspended or revoked. The authority under whose legal custody a paroled prisoner remains . . . has broad power to suspend or revoke a parole without notice." In re Etie, 27 Cal.2d

753, 758, 167 P.2d 203 (1946).

The federal courts have long acknowledged that such procedures are matters of legislative grace and that notice and hearing may be completely dispensed with without doing violation to constitutional safeguards. Escoe v. Zerbst, 295 U.S. 490 (1935). In that case, which dealt with the revocation of a suspended sentence and probation, the United States Supreme Court stated at page 492:

> "In thus holding we do not accept the petitioner's contention that the privilege has a basis in the Constitution, apart from any statute. Probation or suspension of sentence comes as an act of grace to one convicted of a crime, and may be coupled with such conditions in respect of its duration as Congress may impose."

If the statute does not require a hearing, a fortiori it does not require the appearance of counsel and witnesses. Further, appellant's contention that he was denied his right to counsel and his right to confront witnesses at the parole hearing, overlooks the fact that appellant's appearance before the Adult Authority is in no sense a trial. Appellant's trial terminated upon his being convicted and sentenced; his hearing before the Adult Authority was simply an administrative proceeding to

consider his parole status and to determine what sentence within the limitation prescribed by law the appellant should be required to serve. Since such a statute does not raise constitutional issues, this Court must accept the interpretation of statutes by the highest court of the State of California. U.S. Ex rel Davis v. Ragen, 154 F.2d 288 (7th Cir. 1946), cert. denied, 329 U.S. 743, rehearing denied, 329 U.S. 835; Duffy v. Wells, 201 F.2d 503 (9th Cir. 1952). Appellant, in receiving a parole violation hearing is receiving more, not less, than the statute requires.

The complaint fails to allege any facts disclosing that the Adult Authority abused its discretion in its actions. Indeed, an examination of the documents attached to the complaint reveals that at the hearing on September 18, 1957, on parole violation charges, appellant pled guilty to the violation charged. In view of his express plea of guilty, it can hardly be contended that his parole was revoked without cause.

CONCLUSION

We respectfully submit that the order of the District Court should be affirmed.

Dated: February 14, 1966.

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of the State of California

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

Dated: San Francisco, California
February 14, 1966

Edward P. O'Brien
EDWARD P. O'BRIEN
Deputy Attorney General
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